Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MARSH & MCLENNAN COMPANIES, INC.,
Petitioner,

v.

PALMER & CAY, INC. and JAMES B. MEATHE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD C. ROSEN
OF COUNSEL
MARSH & MCLENNAN COMPANIES, INC.
Legal Department
1166 Avenue of the Americas
New York, NY 10036
(212) 345-5220

WILLIAM G. MIOSSI
GENE C. SCHAERR
Counsel of Record
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, D.C. 22206

MICHAEL P. ROCHE
LINDA T. COBERLY
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

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QUESTION PRESENTED

Whether constitutional principles of federalism and state sovereignty preclude a court from declaring that an otherwise valid contract cannot be enforced in any State because of one State's public policy against enforcing such contracts.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Marsh & McLennan Companies, Inc., has no parent corporation, and no publicly held entity owns 10% or more of its stock.

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Maureen B. Callahan, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703 (1985) 15

Christopher D. David, Note, *When a Promise Is Not a Promise: Georgia's Law on Non-Compete Agreements, as Interpreted by the Eleventh Circuit in* Keener v. Convergys Corp., *Gives Rise to Comity and Federalism Concerns*, 11 J. INTELL. PROP. L. 395 (2004) 17

Gillian Lester, *Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis*, 76 IND. L.J. 49 (2001) 14

BRIAN M. MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (4th ed. 2003) 7

M. Scott McDonald, *Noncompete Contracts: Understanding the Cost of Unpredictability*, 10 TEX. WESLEYAN L. REV. 137 (2003) 14

Molly McDonough, *Noncompete Pact Hits Georgia Roadblock; State's Ruling Should Have National Effect, 11th Circuit Says*, ABA JOURNAL EREPORT, Apr. 15, 2005 16

ERIC A. POSNER & GEORGE G. TRIANTIS, COVENANTS NOT TO COMPETE FROM AN INCOMPLETE CONTRACTS PERSPECTIVE (Sept. 26, 2001) (John M. Olin Program in Law & Economics Working Paper No. 137, 2d Series) 14

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Symeon C. Symeonides, *Choice of Law in the American Courts in 2001 Fifteenth Annual Survey*, 50 AM. J. COMP. L. 1 (2002) 17

PETITION FOR A WRIT OF CERTIORARI

Petitioner Marsh & McLennan Companies, Inc. respectfully requests that this Court issue a writ of certiorari to review a decision of the U.S. Court of Appeals for the Eleventh Circuit. This case presents important questions of federalism and state sovereignty—specifically, the ability of one State, based on its own public policy determinations, to control the enforcement of an otherwise valid contract outside its own borders.

OPINIONS BELOW

The opinion of the Eleventh Circuit (App. 1a - 22a) was issued on April 1, 2005 and is reported at 404 F.3d 1297. The Eleventh Circuit denied panel rehearing and rehearing en banc in an unpublished order on May 31, 2005 (App. 23a - 24a). The opinion of the U.S. District Court for the Southern District of Georgia, issued on November 11, 2003 (App. 25a – 44a), was not reported but is available electronically at 2003 WL 24096162.

JURISDICTION

The judgment of the Eleventh Circuit was entered on April 1, 2005. Petitioner filed a timely petition for panel rehearing and rehearing en banc, and that petition was denied on May 31, 2005 (App. 23a - 24a). This Court has jurisdiction to consider this Petition under 29 U.S.C. § 1254(1).

INTRODUCTION

In this case, the Eleventh Circuit has issued a decision that seriously undermines the ability of individual States to implement their own public policies as to the enforceability of contracts within their